No. 16-1466

IN THE

Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR AMICI CURIAE CHARLES FRIED AND ROBERT C. POST IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICI CURIAE[1]

Amici are professors of law who teach and write about constitutional law, with a particular focus on the First Amendment. Their legal expertise thus bears directly on the constitutional issues before the Court.

Amici are Charles Fried, Beneficial Professor of Law, Harvard Law School, and Robert C. Post, Sterling Professor of Law, Yale Law School.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

Over the past several decades, the Court has established important First Amendment doctrines that empower government employers to manage the speech of their employees, *e.g.*, *Garcetti* v. *Ceballos*, 547 U.S. 410 (2006), and authorize certain nongovernmental organizations to require payment of fees necessary to support the public functions they perform, *e.g.*, *Keller* v. *State Bar of Cal.*, 496 U.S. 1 (1990). Amici file this brief in the interest of neither party, but instead seek to preserve the integrity of these First Amendment doctrines. These doctrines would be substantially undermined were this Court to accede to petitioner's request categorically to hold public-sector agency fees unconstitutional under the First Amendment. At the same time, however, respondents' defense of the status quo fails to address the constitutional ambiguities and ad-

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties providing blanket consent to the filing of amicus briefs are on file with the Clerk.

[2] Institutional affiliations are provided for identification purposes only.

ministrative difficulties identified by this Court in *Harris* v. *Quinn*, 134 S. Ct. 2618 (2014).

Amici therefore propose a path that differs from both petitioner and respondents. The Court can resolve the concerns identified in *Harris* and preserve established First Amendment jurisprudence by adopting a narrower and more doctrinally consistent test for chargeability: the statutory-duties test proposed by Justices Scalia, O'Connor, Kennedy, and Souter in *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507 (1991). Under that rule, contributions to a public-sector union "can be compelled only for the costs of performing the union's statutory duties as exclusive bargaining agent." *Id.* at 550 (Scalia, J., concurring in the judgment and dissenting in part).

In seeking a categorical prohibition on agency fees, petitioner claims that *all* union speech directed to the government is "political speech indistinguishable from lobbying the government." Pet. Br. 10-11. That is manifestly incorrect. When a union discharges statutory duties, it engages in speech that "owes its existence" to the State's chosen system for managing its workforce; funding such speech—which is directed to the government as an employer, not to the government as a sovereign—does not implicate "any liberties the employee might have enjoyed as a private citizen." *Garcetti*, 547 U.S. at 422. Concluding otherwise would set in motion drastic changes in First Amendment doctrine that essentially threaten to constitutionalize every workplace dispute and, further, to unsettle other constitutional doctrines that distinguish between the government as employer (or proprietor) and as sovereign.

Respondents, however, are mistaken in contending that all is well. Under *Abood* v. *Detroit Board of Edu-*

cation, 431 U.S. 209 (1977), public-sector unions have been permitted to charge agency fees for lobbying, advertising, and similar speech that is "germane" to the unions' collective-bargaining activities. That broad, imprecise test compels some employees to fund truly political speech, which may be defined as speech that an employee communicates as a citizen. The compulsory funding of such speech is a cognizable injury to the constitutional rights dissident employees enjoy as citizens.

The statutory-duties test provides the correct path forward. Public-sector unions have statutory duties only in States that have chosen to impose them to manage their public-sector workforce. A duly-elected bargaining agent in such a system speaks for employees *qua* employees and, in most such States, receives funding from agency fees that are assessed as a term of employment. By respecting the prerogative of state employers to manage their workforce in a manner that suits local needs and values, the statutory-duties test is faithful to this Court's decision in *Garcetti*. At the same time, the test protects against the compelled support of lobbying, advertising, and other speech outside of a State's system for managing its workforce. The test also preserves the principles that inform the broad range of the Court's compulsory-fee cases, which recognize that the government's interests in funding comprehensive regulatory regimes through mandatory fees are entirely compatible with the First Amendment interests of dissident fee payers.

Finally, the statutory-duties test resolves the difficulties discussed in *Harris*. The "conceptual difficulty" of distinguishing between collective bargaining and lobbying in the public sector, 134 S. Ct. at 2633, is resolved by looking to whether the union engages the government as an employer within a statutory system

of labor relations, or instead as a sovereign, outside of the strict context of employment. Under this test, the latter cannot by funded through mandatory agency fees. The statutory-duties test is also administrable. Indeed, this Court has applied an analogous test in the private sector for decades, permitting only those fees "necessary to 'performing the duties of an exclusive representative.'" *Communication Workers of Am.* v. *Beck*, 487 U.S. 735, 762 (1988); *see also Lehnert*, 500 U.S. at 552 (Scalia, J., concurring in the judgment and dissenting in part) (discussing private-sector origins of statutory-duties test).

ARGUMENT

I. Under The Public-Employee Speech Doctrine, Employees Have No Cognizable First Amendment Interests In Paying Agency Fees For Discharging A Union's Statutory Duties

A. The Public-Employee Speech Doctrine Protects The Government's Managerial Prerogatives As An Employer

1. The Court's public-employee speech jurisprudence has long recognized that "'the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs.'" *Connick* v. *Myers*, 461 U.S. 138, 151 (1983). Thus, "a government entity has broader discretion to restrict speech when it acts in its employer role" than when it acts as a sovereign, and when a citizen chooses to enter government service, "the citizen by necessity must accept certain limitations on his or her freedom." *Garcetti* v. *Ceballos*, 547 U.S. 410, 411, 418 (2006). Such restraints "are justified by the consensual nature of the employment relationship and by the unique nature of

the government's interest." *Borough of Duryea, Pa.* v. *Guarnieri*, 564 U.S. 379, 387 (2011).

At the same time, "a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment." *Connick*, 461 U.S. at 140; *see also Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977) ("[A] government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment."). The framework the Court has developed for applying the First Amendment to the public workplace accommodates the need for public employers to enjoy sufficient latitude to manage their workforce with the necessity of protecting public employees' rights as citizens.

To state a First Amendment claim, a public employee must establish both that the employee is speaking as a citizen, and that the speech is on a matter of public concern. *Guarnieri*, 564 U.S. at 386; *Garcetti*, 547 U.S. at 418; *Connick*, 461 U.S. at 150. Even if these two conditions are satisfied, "the employee's speech is not automatically privileged," *Guarnieri*, 564 U.S. at 386; a case-specific balancing is required. Courts must "balance the First Amendment interest of the employee against 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Id.* (citing *Pickering* v. *Board of Educ. of Twp. High Sch. Dist. 205, Will Cty., Ill.*, 391 U.S. 563, 568 (1968)). If "the balance favors the employer, the employee's First Amendment claim will fail even though the [burdened activity involves] a matter of public concern." *Id.* at 398.

This structured analysis preserves the Court's historically "cautious and restrained approach to the pro-

tection of speech by public employees." *Guarnieri*, 564 U.S. at 391. That caution is rooted in the "common sense realization that government offices could not function if every employment decision became a constitutional matter." *Connick*, 461 U.S. at 143; *see also Engquist* v. *Oregon Dep't of Agric.*, 553 U.S. 591, 598 (2008) ("'The government's interest in achieving its goals as effectively and efficiently as possible is elevated ... to a significant one when it acts as employer.'").

2. This same caution is evident in the Court's decisions rejecting First Amendment challenges to government policies for managing relations with a public workforce, especially policies involving collective bargaining.

Public-sector bargaining regimes are purely creations of state law. *See, e.g., Smith* v. *Arkansas State Highway Emps., Local 1315*, 441 U.S. 463, 465 (1979) (no constitutional right to bargain with the State). They express a State's judgment about how best to manage its own public workforce. *See, e.g., Minnesota State Bd. for Cmty. Colls.* v. *Knight*, 465 U.S. 271, 284 (1984) ("To recognize a constitutional right to participate directly in government policymaking would work a revolution in existing government practices."). The States' managerial discretion is akin to the broad latitude the government enjoys when acting in a proprietary rather than sovereign capacity. *See, e.g., Building & Constr. Trades Council* v. *Associated Builders & Contractors*, 507 U.S. 218, 227 (1993) ("Our decisions ... support the distinction between government as regulator and government as proprietor."); *Perry Educ. Ass'n* v. *Perry Local Educators Ass'n*, 460 U.S. 37, 50-51 & n.10 (1983) (affirming school district's policy of granting union exclusive access to faculty mailboxes to discharge its "official duties" as an exercise of the district's man-

agement of school property); *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 304 (1974) (affirming city's "managerial decision" to exclude political advertising in public transit system as a "reasonable legislative objective[] advanced by the city in a propriety capacity").

Public-sector bargaining regimes involve the same state managerial prerogatives to which the Court has expressed deference in the *Garcetti* line of cases. *See, e.g.*, *Minnesota State Bd.*, 465 U.S. at 285 (warning against "massive intrusion into state and federal policymaking," and citing "both federalism and separation-of-powers concerns"); *Garcetti*, 547 U.S. at 423 (warning against "judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers").

States exercise their managerial prerogatives in different ways. Some States forbid any public-sector collective bargaining. *See, e.g.*, N.C. Gen. Stat. § 95-98. Others distinguish among employees. *See, e.g.*, Tex. Gov't Code §§ 174.002, 617.002 (authorizing fire fighters and police officers to collectively bargain, but otherwise forbidding it). States that do permit bargaining also typically limit the topics that may be the subjects of bargaining. *See, e.g.*, 5 Ill. Comp. Stat. 315/4 ("Employers shall not be required to bargain over matters of inherent managerial policy[.]"); *Madison Teachers, Inc.* v. *Walker*, 851 N.W.2d 337, 347 (Wis. 2014) (State could limit collective bargaining to the single issue of base wages).

This Court has interpreted the First Amendment, consistent with *Garcetti*, to give ample room to state employers to structure public workplaces as they believed most effective, without undue First Amendment

restrictions. In *Minnesota State Board*, for example, the Court upheld against First Amendment challenge a state law that required public employers both to bargain over the terms and conditions of employment and to "meet and confer" on other employment matters only with their employees' exclusive representative. 465 U.S. at 274. Dissenting employees argued that this system violated the First Amendment. Rejecting their challenge in all respects, the Court concluded that the dissenting employees had no right "to force officers of the state ... to listen to them in a particular formal setting"; that the meet-and-confer sessions were "obviously not a public forum"; and that the "amplification" of the union's voice by virtue of its statutory role did not impair employees' First Amendment rights to speak outside the statutory framework. *Id.* at 280, 289.

B. A Categorical Prohibition On Agency Fees Would Create Jurisprudential Contradictions And Undermine The Government's Managerial Prerogatives As An Employer

The essential insight of the *Garcetti* line of cases is that if public employees are accorded categorical First Amendment rights, public employers will be denied the broad discretion they need to manage their workplaces. States will be stripped of their capacity effectively to govern in accordance with local needs and values. It is inconsistent with *Garcetti*'s carefully drawn distinction between speaking as an employee and speaking as a citizen to hold that the compulsory payment of agency fees is categorically protected under the First Amendment. Any such holding would therefore threaten to transform every workplace dispute into a constitutional controversy.

1. The test for whether an individual acts as a citizen or as a public employee is whether the speech is made "pursuant to" the employee's official duties. *Garcetti*, 547 U.S. at 421. The rationale for this threshold requirement is that "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer has itself commissioned or created." *Id.* at 422.

Insofar as agency fees support the statutory functions of an exclusive representative, they operate in aid of a State's control over its own system of public employment and the responsibilities it has chosen to assign to the union within that system. The State authorizes such fees by statute and negotiates collective-bargaining agreements requiring them as a term of public employment.[3] The fees fund the designated union's employment-related speech concerning labor relations. This is evident from the record in this case, which shows that the challenged fees cover, for example, "[n]egotiating collective bargaining agreements," "[a]djusting grievances pursuant to the provisions of collective bargaining agreements, enforcing collective bargaining agreements, and representing employees in

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[3] *See, e.g.*, 5 Ill. Comp. Stat. 315/3(g) ("all or any of the employees in a collective bargaining unit are required to pay" agency fees as set forth in "an agreement between the employer" and the exclusive bargaining representative); JA124 (agency fees "shall be deducted from the earnings of the non-member employees as their share of the cost of the collective bargaining process, contract administration and the pursuance of matters affecting wages, hours and conditions of employment").

proceedings under civil service laws and regulations." Pet. App. 29a; *see also* 5 Ill. Comp. Stat. 315/3(g).[4]

Union representatives discharging their statutory duties therefore are speaking on behalf of employees *qua* employees, with funding from employees *qua* employees, within a statutory system created to manage the State's relationship with its employees *qua* employees. Their speech "owes its existence" to the State's chosen system of labor relations and does not implicate "any liberties the employee might have enjoyed as a private citizen." *Garcetti*, 547 U.S. at 422.

That this case involves employee *funding* of speech, rather than employee speech itself, does not distinguish *Garcetti*. There can be no First Amendment claim for restricting speech made in the context of a system "commissioned or created" by the government acting as employer. 547 U.S. at 422. This principle applies with equal force to a claim of compelled speech. *See Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988) (the "difference between compelled speech and compelled silence ... is without constitutional significance"). Indeed, public employees are routinely compelled to speak pursuant to their official duties, and courts have rejected First Amendment challenges to such compulsion under *Garcetti*.[5] If the employee speech at issue here can be re-

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[4] Respondent AFSCME issues a notice—known as a "*Hudson* notice"—annually to all represented employees reporting its agency fees for the year, pursuant to *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292 (1986). *See* AFSCME Opp. 7 & n.4.

[5] *See, e.g., Bowie* v. *Maddox*, 642 F.3d 1122, 1133-1134 (D.C. Cir. 2011) (rejecting compelled-speech claim by assistant inspector general who was allegedly fired for refusing to sign an affidavit because, under *Garcetti*, "he was not speaking 'as a citizen,'" but

stricted or compelled without First Amendment challenge, so too can the funding of such speech. Because a claim of compelled funding of speech is more attenuated than a claim of compelled speech *simpliciter*, this conclusion follows *a fortiori* from *Garcetti*.

Of course, compelled funding of union expenditures *outside* of the employment context would raise First Amendment concerns. But the Court has consistently resolved such concerns by limiting the purposes for which unions can collect fees (as would the proposed statutory-duties test), rather than by categorically prohibiting such fees. *See, e.g., Abood*, 431 U.S. at 236; *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991); *cf. Communication Workers of Am.* v. *Beck*, 487 U.S. 735, 762 (1988).[6]

2. A categorical rule holding agency fees unconstitutional would also blur the limits the Court has been careful to place on what constitutes a "matter of public

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rather "was acting 'pursuant to [his] official duties'"); *see also Evans-Marshall* v. *Board of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332, 341-342 (6th Cir. 2010) (explaining that a public-school teacher could not "respond to a principal's insistence that she discuss certain materials by claiming that it improperly *compels* speech" because, under *Garcetti*, "the First Amendment has nothing to say about th[is] kind of decision[]").

[6] In other contexts involving the collection of mandatory fees, the Court has also resolved First Amendment concerns by crafting appropriate limitations on the use of such fees rather than imposing categorical prohibitions on their collection. *See, e.g., Board of Regents of Univ. of Wis. Sys.* v. *Southworth*, 529 U.S. 217, 231 (2000) (authorizing mandatory student-activity fees under a viewpoint neutral framework); *Keller* v. *State Bar of Cal.*, 496 U.S. 1, 4 (1990) (holding that lawyers "may be required to join and pay dues to the State Bar," but narrowing "the scope of permissible dues-financed activities in which the State Bar may engage"); *see infra* pp. 17-19.

concern" for constitutional purposes. Here, too, the Court has rejected a categorical approach in favor of a case-specific inquiry: "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-148. The Court has thus rejected the categorical proposition that "all matters which transpire within a government office are of public concern." *Id.* at 149.

The record reveals that certain activities funded by the agency fees at issue in this case cover the very types of routine workplace matters that the Court has carefully refrained from constitutionalizing with First Amendment protections. As the *Hudson* notice in the record details, some of the challenged fees are for "adjusting grievances ... and representing employees in proceedings under civil services laws or regulations." Pet. App. 29a. The Court has previously held that such activities are *not* matters of public concern. *See Guarnieri*, 564 U.S. at 399 ("[A] complaint about a change in the employee's own duties does not relate to a matter of public concern."); *see also id.* at 391 (cautioning against "invasive judicial superintendence" into "grievances on a variety of employment matters, including working conditions, pay, discipline, promotions, leave, vacations, and terminations").

A ruling categorically prohibiting agency fees would necessarily elevate these types of pedestrian workplace matters into matters of public concern. Petitioner evidently agrees. Pet. Br. 14-15 (arguing that the grievance process is subject to the First Amendment). That is irreconcilable with this Court's precedent. Indeed, the employee's claim in *Connick* "failed the public concern test" precisely because the work-

place questionnaire she distributed—addressing matters like the need for a grievance committee—"was 'most accurately characterized as an employee grievance concerning internal office policy.'" *Guarnieri*, 564 U.S. at 392 (describing *Connick*); *see also Connick*, 461 U.S. at 149. If the Court in this case holds that employee grievances are a matter of public concern, it will have to accept the same result in countless other scenarios—including, for example, a public employee's complaint of a superior's "poor management and motivational skills," *Ezekwo* v. *New York City Health & Hosps. Corp.*, 940 F.2d 775, 778 (2d Cir. 1991), a superior's lack of leadership ability, *Graziosi* v. *City of Greensville Mississippi*, 775 F.3d 731, 738 (5th Cir. 2015), and, more generally, employment conditions and personal dissatisfaction with personnel decisions, *Brooks* v. *Arthur*, 685 F.3d 367, 372 (4th Cir. 2012).

The potential for collective bargaining to affect the public fisc (*see* Pet. Br. 12-15) does not change this conclusion. This Court has recognized that workplace speech "does not attain th[e] status" of a matter of public concern just "because its subject matter could, in different circumstances, have been a topic of a communication to the public that might be of general interest." *Connick*, 461 U.S. at 148 n.8. Were this not the case, any public employee whose speech might affect the public fisc (*e.g.*, contract officers, budget analysts, revenue agents) would enjoy newfound First Amendment protection for their workplace speech.[7]

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[7] The consequences of accepting petitioner's categorical rule would go further still. The distinction between the government as employer (or proprietor) and as sovereign pervades constitutional law. *See supra* pp. 6-7 (citing, *e.g.*, *Building & Constr. Trades Council*, 507 U.S. at 227); *see also, e.g.*, *NASA* v. *Nelson*, 562 U.S. 134, 138, 148-149 (2011) (emphasizing the distinction between the

3. A categorical prohibition on agency fees would also mark an abandonment of the balancing that is the final step in the Court's public-employee speech cases. Once an employee has overcome the threshold requirements, *i.e.*, speaking as a citizen on a matter of public concern, "[t]he question becomes whether the government entity ha[s] an adequate justification for treating the employee differently from any other member of the general public." *Garcetti*, 547 U.S. at 418. As the Court explained in *Connick*, "[t]he *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." 461 U.S. at 150.

Nearly half the States have chosen to authorize agency fees for unionized public workplaces; they have decided that well-funded collective-bargaining arrangements are best-suited to serving their citizens effectively and efficiently. *See* Pet. 9 n.3; AFSCME Opp. 1. These discretionary state judgments deserve respect and must be weighed in the balance mandated by *Pickering*, *Connick*, and *Garcetti*. At the same time,

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government "'as proprietor'" and as "sovereign" in rejecting a constitutional privacy claim); *Engquist*, 553 U.S. at 607, 609 ("the class-of-one theory of equal protection has no application in the public employment context"; a rule to the contrary "would impermissibly 'constitutionalize the employee grievance'"); *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 436 (1980) (under the Commerce Clause, "[t]he basic distinction ... between States as market participants and States as market regulators makes good sense and sound law"); *Cafeteria & Rest. Workers Union, Local 473* v. *McElroy*, 367 U.S. 886, 894-896 (1961) (in rejecting a due process claim, explaining that the government acted "as proprietor," where the government had more control, not "as lawmaker"). Petitioner's rule would erase that distinction in this case, and if he were to prevail, the numerous other doctrines that rely on it would be at serious risk.

as *Abood* recognized, public employees in a unionized workplace "are free to participate in the full range of political activities open to other citizens" when they speak outside the workplace. 431 U.S. at 230 (citing *City of Madison, Joint Sch. Dist. No. 8* v. *Wisconsin Emp't Relations Comm'n*, 429 U.S. 167, 174 (1976)).

The categorical approach sought by petitioner would ignore the balancing requirement and preclude States and localities from funding *any* workplace-management activities through agency fees. States and localities could not even use agency fees to fund routine matters such as "[a]djusting grievances ... and representing employees in proceedings under civil service laws and regulations." Pet. App. 29a. The necessary implication would be that, with respect to such matters, *no* government interest could be sufficient to tip the balance in favor of the government's chosen means of managing its own workforce and dealing with disgruntled employees.

4. That agency fees are imposed on bargaining-unit employees as a class provides no basis for a distinction. To the contrary, the Court has recognized that its precedent includes cases addressing requirements imposed on employees as a class. *See Connick*, 461 U.S. at 144; *see also, e.g.*, *Wieman* v. *Updegraff*, 344 U.S. 183, 184-185 (1952) (evaluating "validity of a loyalty oath prescribed by Oklahoma statute for all state officers and employees"), *cited in Connick*, 461 U.S. at 144; *cf. Minnesota State Bd.*, 465 U.S. at 273 (affirming state power to impose restrictions on employees as a class by making a union the exclusive employee representative).

Nor was there any suggestion in *Garcetti* or *Connick* that the number of employees at issue had any

bearing on First Amendment analysis. Had there been multiple employees involved in either *Connick* or *Garcetti*, for example, the same doctrinal framework surely would apply—*i.e.*, the Court would ask whether the speech was made as a citizen and addressed a matter of public concern, and whether the employees' interests outweighed the State's interest in managing its workforce. *Garcetti*, 547 U.S. at 422.

Because First Amendment rights are ultimately individual in character, the First Amendment claims of a class of employees can be no stronger than the claims of the individuals who make up the class. And if, as *Garcetti* holds, each individual employee has no First Amendment right to "express views that contravene governmental policies or impair the proper performance of governmental functions," 547 U.S. at 419, no class of employees can claim any such right. Indeed, the presumption might well work the other way. When employees as a group fail to speak in accord with the terms of their employment, the government's interest in "promoting the efficiency of the public services it performs through its employees," *Pickering*, 391 U.S. at 568, is likely even stronger because the threat to workplace effectiveness is correspondingly larger. *See, e.g.*, *Garcetti*, 547 U.S. at 419, 422.

II. Even If Agency Fees For Discharging Statutory Duties Did Implicate Public Employees' First Amendment Interests, Such Fees Would Be Justified Under This Court's Compulsory-Fee Precedents

Even if the Court were to determine that employees enjoy some First Amendment interests in the narrow context of paying fees to support a union's statutory duties, a categorical prohibition on agency fees

would still be inappropriate under the Court's compulsory-fee cases. Relying on *Abood*, this Court has repeatedly held that government interests in collective action under comprehensive regulatory regimes may justify mandatory subsidization of private speech. The reasoning of these cases applies equally, if not with greater force, to the payment of agency fees for discharging a union's statutory duties.

A. State Interests Under Comprehensive Regulatory Regimes Can Outweigh Individual First Amendment Interests

This Court has recognized many times that the government has a strong interest in compelling participants in a regulatory regime to directly pay for its costs. *See, e.g.*, *Harris*, 134 S. Ct. at 2644 ("States ... have a strong interest in allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices."). The Court has invoked *Abood* for this principle, and, outside the context of government speech, *Abood* forms the modern foundation for this Court's compulsory-fee precedent in contexts like agricultural marketing and integrated bars.

In *Glickman* v. *Wileman Bros. & Elliott*, 521 U.S. 457, 463 (1997), for example, the Court addressed a federal regulatory scheme that imposed assessments on fruit producers to finance various aspects of the regulatory program, which included generic advertising of stone fruits. The Court upheld these mandatory assessments, "stress[ing] the importance of the statutory context" in which they arose—*i.e.*, "a broader collective enterprise in which [the business entities'] freedom to act independently is already constrained by the regulatory scheme." *Id.* at 469. The Court explained that

Abood and its progeny "provide affirmative support for the proposition that assessments to fund a lawful collective program may sometimes be used to pay for speech over the objection of some members of the group" where the speech was in furtherance of a broader collective purpose. *Id.* at 472-473. The Court also recognized that, like the agency fees upheld in *Abood*, the mandatory assessments did not "require [the business entities] to repeat an objectionable message out of their own mouths," thus distinguishing compelled-speech cases like *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624 (1943). 521 U.S. at 470-471.

The Court reaffirmed *Glickman*'s holding in *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001). The mandatory assessments in *Glickman*, the Court stated, were constitutionally permissible because they "were ancillary to a more comprehensive program restricting marketing autonomy." *Id.* at 411; *see also Johanns* v. *Livestock Mktg. Ass'n*, 544 U.S. 550, 558 (2005) (resolving case on government-speech grounds, but reaffirming *Abood* and *Keller*).

The Court has also upheld compulsory fees imposed by integrated bars. *See Keller*, 496 U.S. at 1, 13-14; *Lathrop* v. *Donohue*, 367 U.S. 820, 843 (1961) (plurality op.). In *Keller*, the Court unanimously used the constitutional framework of *Abood* to hold that bar-membership dues were constitutional. *See* 496 U.S. 1, 4, 13-14; *see also Southworth*, 529 U.S. at 231 ("The principles outlined in *Abood* provided the foundation for our ... decision in *Keller*."). The California State Bar, like the union in *Abood*, served important state interests by performing functions assigned by the State. *Keller*, 496 U.S. at 4, 12. Individual lawyers in *Keller* may have had residual First Amendment rights not to be compelled to subsidize the bar, but these

rights were outweighed by the public need for a functioning bar organization under the State's chosen system for administering the legal profession. *Id.*

Analogously, even if one assumes that dissident employees in this case retain residual First Amendment rights in the narrow context of paying fees to support a union's statutory duties, those rights are outweighed by a State's interest in managing its own workforce. *See infra* pp. 20-22. In *Keller*, the Court emphasized that the constitutionality of agency fees turns on recognizing the important government interests served by agency shops, as well as the fundamental fairness of requiring all beneficiaries of collective bargaining to share its costs. 496 U.S. at 12, 13.

These precedents illustrate some of the many situations in which organizations assigned responsibilities by the government must overcome free-rider problems and impose compulsory fees. In these situations, the Court has drawn on the principles of *Abood* to conclude that the government's interests can outweigh any residual First Amendment interests individuals retain in refusing to pay fees. It was on that basis that the Court permitted the compulsory fees in *Glickman* and *Keller*, notwithstanding any First Amendment burden on individual members. *See Glickman*, 521 U.S. at 472-473; *Keller*, 496 U.S. at 12-14; *cf. Southworth*, 529 U.S. at 232 (authorizing mandatory fees to fund student extracurricular program even though it was "all but inevitable that the fees will subsidize speech that some students find objectionable or offensive"). If, as petitioner asks, *Abood* is to be flatly overruled, all these many cases and applications would be thrown into the most serious confusion.

B. Agency Fees For Discharging Statutory Duties Fit Comfortably Within This Court's Compulsory-Fee Precedents

Agency fees for discharging a public-sector union's statutory duties are constitutional under this Court's compulsory-fee precedents. Narrowly tailored to the union's obligations imposed by statute as part of a comprehensive regulatory regime, such fees serve a compelling state interest that overrides any residual First Amendment interest of dissenting employees.

Agency fees are an important feature of one of the most longstanding, complex, and delicately-balanced regulatory schemes in the country—dating back to the recognition of organized labor in the 1930s, existing at both the state and federal level and in both the public and private sectors. *See, e.g.*, *Lehnert*, 500 U.S. at 550 (Scalia, J., concurring in the judgment and dissenting in part) (describing history); *Beck*, 487 U.S. at 747-753. When a State enacts a comprehensive program that restricts the bargaining autonomy of individual employees, its interest in allowing fees to support statutory collective bargaining is surely as strong as those in *Glickman* and *Keller*. *Cf. United Foods*, 533 U.S. at 411 (addressing *Glickman*'s "comprehensive program restricting marketing autonomy" of California fruit growers). Indeed, as Justice Scalia explained in *Lehnert*, "where the state creates in nonmembers a legal entitlement from the union," it has a "'compelling'" interest in requiring those nonmembers to pay the cost. 500 U.S. at 556.

Harris is not to the contrary. The Court there explained that its decision not to extend *Abood* to home-care workers "fit[] comfortably within the framework" of the compulsory-fee cases because the State's regula-

tory interest that animated *Abood* and *Keller* was not implicated when the home-care workers were, in the Court's words, "deemed public employees *solely* for the purpose of unionization and the collection of an agency fee," not as part of a larger regulatory or policy program. *Harris*, 134 S. Ct. at 2643-2644, 2627 (emphasis added); *cf. United Foods*, 533 U.S. at 411-412 (no fees for advertising that was the "the principal object of the regulatory scheme"). That distinction is absent here.

Nor can the *Glickman* and *Keller* lines of precedent be distinguished on the ground that agency fees cover "speech in favor of increased wages and benefits," which "would almost certainly mean increased expenditures," and thus involve "a matter of great public concern." *Harris*, 134 S. Ct. at 2642-2643. In *Keller*, for example, the California State Bar used mandatory dues to lobby for or against a range of government policies that would affect the public fisc, including "creating an unlimited exclusion from the gift tax for gifts to pay for education tuition and medical care," "deleting the requirement that local government secure approval of the voters prior to constructing low-rent housing projects," and "limiting the right to individualized education programs for students in need of special education." 496 U.S. at 6 n.2. That the Bar's expenditures included lobbying on such matters did not justify a categorical ban on mandatory bar dues; rather, the Court remanded for further proceedings to develop the fuller record required to disaggregate the chargeable from the nonchargeable expenditures and to fashion an appropriate remedy. *Id.* at 17. No such remand would have been

required, of course, if all expenditures implicating public funding were non-chargeable on that basis alone.[8]

III. The Court Should Adopt The Statutory-Duties Test, As Proposed By Justices Scalia, O'Connor, Kennedy, And Souter In *Lehnert*

The Court has recently discussed a "conceptual difficulty" in distinguishing between public-sector union expenditures that are "made for collective-bargaining purposes," and thus are chargeable to nonmembers consistent with the First Amendment, "and those that are made to achieve political ends," and thus are nonchargeable. *Harris*, 134 S. Ct. at 2632. The Court also has identified "practical administrative problems" following *Abood*. *Id.* at 2633.

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[8] None of the foregoing depends on whether the claims of dissident employees are viewed as based on compelled speech, compelled association, or both. *See, e.g.*, Pet. Br. 2, 9 (referencing "compelled speech and association" together). The same conclusions apply irrespective of the right asserted in this case because identical principles underlie speech and association claims. In *Keller*, for example, the Court found "the compelled association and integrated bar ... justified" by the State's important regulatory interest, and accordingly held that lawyers "may be required to join and pay dues to the State Bar." 496 U.S. at 4, 13-14; *see also Southworth*, 529 U.S. at 227 (in upholding mandatory student-activity fee, analyzing together students' claimed violation of their "rights of free speech" and "free association"); *cf. Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 40 (2010) (rejecting free-association challenge for the same reasons as free-speech challenge). If anything, any claims of compelled association would be weaker here than they were in *Keller* because, unlike lawyers who are required to *join the bar* as a condition of practicing, dissident employees need not join a public-sector union as a condition of their employment. Moreover, under the statutory-duties test, dissident employees need only fund union activity in a sphere where they are *already* associated with the union, because the State requires the union to represent the entire bargaining unit.

The Court can solve these difficulties by adopting the statutory-duties test proposed by Justice Scalia in *Lehnert*, 500 U.S. at 550, a rule narrowly tailored to the context of agency fees. By its terms, the test aligns with the statutory obligations of a union, and it balances the competing interests of unions and dissident employees. The test would also safeguard the Court's important precedents in the areas of public-employee speech and of compelled fees.

A. The Statutory-Duties Test Is An Administrable Rule For Determining The Chargeability Of Agency Fees Narrowly Tailored To The Union Context

1. In *Lehnert*, the Court unanimously reaffirmed *Abood* but divided on the chargeability of the particular expenses at issue. *See* 500 U.S. at 519-527 (opinion of the Court); *id.* at 533-550 (Marshall, J., concurring in part and dissenting in part); *id.* at 550-561 (Scalia, J., concurring in the judgment in part and dissenting in part); *id.* at 562-564 (Kennedy, J., concurring in the judgment in part and dissenting in part). The opinions differed in articulating how an expenditure must be related to collective bargaining to be chargeable, and which fees in that case were chargeable. *Compare id.* at 519 (opinion of the Court), *with id.* at 557-558 (Scalia, J.), *and id.* at 562-564 (Kennedy, J.).

The majority established a three-part test, under which "chargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of the speech that is inherent in the allowance of an agency or union shop." 500 U.S. at 519. Applying that test, the Court allowed unions to charge for

a number of expenses, including union conventions, publications, and strike preparations. *See id.* at 527-532.

Justice Scalia, joined by Justices O'Connor, Kennedy, and Souter, disagreed with the majority's three-part test, and proposed a stricter alternative that would have significantly narrowed the majority's test. 500 U.S. at 550-551, 557-558. In their view, chargeability of agency fees should turn only upon the statutory duties the government has chosen to impose upon the union. *Id.*

As Justice Scalia's opinion explained, the statutory-duties test is grounded in this Court's precedent addressing both constitutional and statutory challenges to agency fees. *See* 500 U.S. at 552-558 (discussing *Railway Emps. Dep't* v. *Hanson*, 351 U.S. 225 (1956); *International Ass'n of Machinists* v. *Street*, 367 U.S. 740 (1961); *Abood*, 431 U.S. 209; *Ellis* v. *Brotherhood of Ry., Airline & S.S. Clerks*, 466 U.S. 435 (1984); *Beck*, 487 U.S. 735). Balancing the competing interests of unions and dissident employees in the bargaining unit, that precedent "recogniz[ed] a correlation between the rights and the duties of the union, on the one hand, and the nonunion members of the bargaining unit, on the other." *Id.* at 556. "Where the state imposes upon the union a duty to deliver services," Justice Scalia explained, "it may permit the union to demand reimbursement for them." *Id.* Under this view, the statutory duty of the union is both "the constitutional test and justification." *Id.* at 557 n.2.

Applying this test, Justice Scalia "readily conclude[d] that a number of ... expenses cannot be charged to nonmembers," including in that case "public relations activities," "lobbying expenses," "the union's magazine," "expenses of sending delegates to conventions," and "costs of preparing for a strike." 550 U.S. at 558-562.

Justice Kennedy agreed in full with Justice Scalia's test, but would have construed the union's statutory duties more broadly to include "strike preparation activities," and thus would have found them chargeable as well. 500 U.S. at 562-563. He concluded his separate opinion by cautioning against establishing "rigid categories such as conventions (chargeable) and extraunit litigation (nonchargeable)," counseling in favor of an approach "examin[ing] whether each expense was reasonably or necessarily incurred in the performance of the union's statutory duties as exclusive bargaining representative." *Id.* at 564.

2. The statutory-duties test is narrow and administrable. Indeed, this Court has endorsed and applied an analogous test for decades in the private sector. *See Lehnert*, 500 U.S. at 552-558 (Scalia, J., concurring in the judgment and dissenting in part); *Beck*, 487 U.S. at 762-763. It is tailored to the particular context in which States have elected to rely on collective-bargaining arrangements to manage relations with their employees.

As in this case, the law in agency-fee jurisdictions compels unions to negotiate in good faith toward a contract that will govern the terms of public employment. *See, e.g.*, 5 Ill. Comp. Stat. 315/10(b)(4).[9] And unions' participation in this process is subject to substantial constraints, beginning with the duty to fairly represent all employees (members and nonmembers alike), *see id.*

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[9] 5 Ill. Comp. Stat. 315/10(b)(4) ("It shall be an unfair labor practice for a labor organization or its agents ... to refuse to bargain collectively in good faith with a public employer, if it has been designated ... as the exclusive representative of public employees[.]").

315/6(d),[10] and extending to rules prescribing procedures for bargaining and limiting the topics over which unions and public agencies may bargain, *see id.* 315/4.[11]

Respondent AFSCME's *Hudson* notice lists 36 categories of activities that may be charged to nonmembers in full, in part, or not at all under current law. Pet. App. 28a-33a; *see supra* n.4. Concerning activities that may be charged in full, the notice lists 15 different activities. Pet. App. 28a-30a. Two of these, for example, are at the very core of the union's duties as an exclusive bargaining representative, and thus easily satisfy the statutory-duties test: "[n]egotiating collective bargaining agreements" and "[a]djusting grievances pursuant to the provisions of collective bargaining agreements, enforcing collective bargaining agreements, and representing employees in proceedings under civil service laws and regulations." Pet. App. 29a.

Conversely, other categories of expenses that are charged in full or in part under current law—such as lobbying and public relations activities, Pet. App. 29a—would not be chargeable under a statutory-duties test, as Justice Scalia's opinion in *Lehnert* makes clear. 500

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[10] *Id.* 315/6(d) ("Labor organizations recognized by a public employer as the exclusive representative ... are responsible for representing the interests of all public employees in the unit.").

[11] *Id.* 315/4 ("Employers shall not be required to bargain over matters of inherent managerial policy, which shall include such areas of discretion or policy as the functions of the employer, standards of services, its overall budget, the organizational structure and selection of new employees, examination techniques and direction of employees. Employers, however, shall be required to bargain collectively with regard to policy matters directly affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by employee representatives[.]").

U.S. at 559-562 (identifying expenses that would be non-chargeable under statutory-duties test). "The test of chargeability ... is not whether the activities at issue help or hinder achievement of the union's bargaining objectives, but whether they are undertaken as part of the union's representational duty." *Id.* at 562.

The statutory-duties test meaningfully limits the scope of expenses that may be charged by a union to nonmember employees. And while the chargeability of a particular expense may, in certain cases, require an in-depth analysis of the facts, the statutory-duties test provides clear guidance to unions and to nonmembers who want to challenge union expenditures. It avoids the subjective elements of the current standard. *See Lehnert*, 500 U.S. at 551, 559 n.3 (Scalia, J.).[12]

B. The Statutory-Duties Test Preserves This Court's Precedents On Public-Employee Speech And Compulsory Fees

In addition to being clear and administrable, the statutory-duties test tracks the division between rep-

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[12] Some of the amici supporting petitioner here have themselves previously argued in favor of the statutory-duties test. *See* Pacific Legal Found. et al. Amicus Br. 21, *Locke* v. *Karass*, No. 07-610 (U.S. May 12, 2008) ("Under the *Lehnert* concurrence, which Amici propose the Court adopt as controlling in this case, only the costs of a bargaining unit's statutory duties as collective bargaining representative may be charged to nonmembers[.]"); Mackinac Center for Public Policy Amicus Br. 2, 21, *Davenport* v. *Washington Educ. Ass'n*, Nos. 05-1589, 05-1657 (U.S. Nov. 13, 2006) (the statutory-duties test "respects nonmembers' individuals rights and precludes the possibility that a nonmember could be charged for political expenditures with which he or she does not agree"); *cf.* Commonwealth of Virginia Amicus Br. 2, *Locke* v. *Karass*, No. 07-610 (U.S. May 12, 2008) (the statutory-duties test "is simpler and more manageable for litigants and the lower courts").

resentative activity that is authorized under state labor-law regimes and expressive activity that is independent of those regimes and protected by the First Amendment. It therefore ensures that the law governing agency fees is consistent with and informed by the First Amendment principles underlying the public-employee speech doctrine and the Court's compulsory-fee cases.

First, the statutory-duties test preserves the critical distinction, recognized in *Pickering*, *Connick*, *Garcetti*, and *Guarnieri*, between public employees speaking as employees and public employees speaking as citizens. By limiting agency fees to those covering "the costs of performing the union's statutory duties as exclusive bargaining agent," *Lehnert*, 500 U.S. at 550, the test ensures that all such fees are closely tied to the exercise of statutory rights under state systems for regulating employment, rights to which no citizen is entitled under the First Amendment. It further ensures that the existence of the employment relationship and state labor-relations system is not used as "leverage," *Garcetti*, 547 U.S. at 419, to burden public employees' First Amendment rights on matters outside of those systems. *Cf. City of Madison*, 429 U.S. at 174-175 (statutory bargaining exclusivity cannot preclude citizen speech in public forum).

Second, the statutory-duties test preserves the analytic framework of *Abood*, the foundation of many compulsory-fee decisions. In *Glickman* and *Keller*, the Court emphasized the statutory context and state interests at issue when determining whether a given compulsory-fee scheme was consistent with the First Amendment. *See Glickman*, 521 U.S. at 469, 476; *Keller*, 496 U.S. at 12-14. The statutory-duties test recognizes the importance of state interests in determining

the constitutionality of agency fees and thus protects the government's ability to compel the participants in a regulatory regime to pay for its costs, while providing a method for partitioning expenses that cannot constitutionally be imposed on nonmembers.

Third, the statutory-duties test preserves the authority of the political branches of all the States—allowing each to set (or eliminate) the statutory duties of public-sector unions as best suits local needs and values. The local ascertainment of local needs should not be displaced by a rigid, national, categorical rule. *Cf. Abood*, 431 U.S. at 224-225 ("Our province is not to judge the wisdom of Michigan's decision to authorize the agency shop in public employment."); *Garcetti*, 547 U.S. at 423 ("To hold otherwise would be to demand permanent judicial intervention into the conduct of government operations to a degree inconsistent with sound principles of federalism and the separation of powers.").

Like many other States, Illinois has established a detailed and comprehensive system to govern labor relations in public employment—a system that, in its judgment, serves the best interests of not only public employees and public employers, but also its citizenry as a whole. 5 Ill. Comp. Stat. 315/2 ("It is the purpose of this Act to prescribe the legitimate rights of both public employees and public employers, to protect the public health and safety of the citizens of Illinois, and to provide peaceful and orderly procedures for protection of the rights of all."). Illinois determined that a mechanism for collective labor relations with its public-sector workforce is the best way to achieve its goals. Surely Illinois should possess the power to choose how to fund this mechanism. The statutory duties test preserves its ability to do so within the framework of the Court's established First Amendment decisions.

CONCLUSION

The Court should adopt the statutory-duties test proposed by Justices Scalia, O'Connor, Kennedy, and Souter in *Lehnert*—a clear, administrable rule tailored to the context of public-sector collective bargaining, which parallels the rule the Court has long applied for private-sector agency fees. Because the parties did not have the opportunity to address that test in the context of this case, the Court should vacate and remand for reconsideration under that standard.

Respectfully submitted.

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